

# Employee or Contractor? Lessons from California

by CHARLOTTE HODDE

The method for classifying workers as independent contractors is now simpler, yet riskier, than it has ever been. California enforcement agencies, similar to Oregon, use a variety of legal tests to verify whether employers have correctly identified which workers qualify for independent contractor status. Most of those tests, including the better-known "right to control" and "economic realities" tests, consist of a laundry list of characteristics (often called factors) that swing in favor of either result. Although meeting all the factors is not required to qualify an independent contractor, it is difficult to know how many and which factors are sufficient.

A recently decided landmark California case significantly narrowed the predominant legal test applicable to California workers. To qualify as independent contractors under California's new test, workers must (1) be free from direction or control, (2) be hired to do work other than the usual course of the business, and (3) run their own business. Although California agencies may continue to use older legal standards, this case forecasts the direction many agencies in California, and likely neighboring states like Oregon, will move toward.

With simplicity comes difficulty. The new California legal standard eliminates many of the easily met factors from the other tests. Employers



will no longer find refuge in evidence such as the high level of skill and initiative required in performing the job, the worker providing his or her own workspace and equipment, or labeling the position as an "independent contractor."

One of the most luring traps for employers is the situation when the worker actually requests the status to achieve a flexible work schedule, an alternative work setting, or a higher

mitigating impact on liability. It will be entirely up to the employer to prove that the company followed the rules necessary for independent contractors. While offering independent contractor status might be viewed as a strategy for attracting talent, the risk of liability eclipses any reward in hiring.

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they are expected to do is deliver the result: how they do that is up to them. The third factor requiring them to run their own business means they are performing work for other companies. They likely have an EIN number, market their services, and work for more than one customer at a time.

The second factor is the strictest: independent contractors should not be performing work identical to work that the company is in the business of providing. The proper role for independent contracts in a business is one of the most commonly misunderstood liabilities facing employers. Hiring part-time and sometimes long-term contractors to assist with the company's core business functions has become standard practice in many industries. But that practice cannot continue under California's new test, which other states are likely to adopt.

Properly classifying workers as employees or independent contractors has long been difficult for employers. The independent contractor label provides enticing cost-savings and the legal test is open to interpretation, which makes evaluating the risk difficult. But as employers who have received penalties for inadvertent misclassification know, the downstream exposure for misclassifying employees as independent contractors is significant and regulators are unforgiving in pursuing even well-meaning businesses.

This trend towards a narrower definition of independent contractors, like the one we have seen in California, will have the greatest impact on companies in the gig economy. These companies often have employees in more than one state and usually at least some in California. For those companies, adhering to the new California standard in hiring independent contractors will provide consistency and assure a safe harbor from liability. For Oregon employers, this test is a reminder to be sure you are following the correct independent test that applies to your workers, whether located in this state or another.

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paycheck. But the interest of the worker in the independent contractor arrangement at the outset guarantees nothing of his or her agreeability down the line, nor is it an element of any of the tests. If the independent contractor later files suit claiming that he or she should have been treated like an employee all along, how the relationship started will have no

independent contractors must ensure they have met at least these three factors. Demonstrating a contractor's independence from supervision should be the most familiar of the three factors. Independent contractors must be free to determine when they work, where they work, and how they get the job done. They are hired to complete a discrete project and all

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